IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 151 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LILABEN MOHANBHAI VANZARA - Accused No.1 - Appellant No.1
NARMADABEN JESINGBHAI VANZARA - Accused No.2 - App. No.2
Versus
THE STATE OF GUJARAT- Respodnent

Appearance:
MS BANNA DUTTA FOR MR YU MALIK for Appellants No. 1&2
MR PM VYAS for Appellants No.1 & 2
MR GOVIND V. PATEL - Absent
MR MA BUKHARI, APP for Respondent - State

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE D.K.TRIVEDI

Date of decision: 20/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellants have challenged the judgement and order dated 31st January 1995 in Sessions Case No. 125 of 1990 convicting them for the offence under section 302 of the Indian Penal Code and sentencing each of them to imprisonment for life and pay a fine of Rs.500=00, in default to undergo rigorous imprisonment for six months.

2. The appellants were charged for the offences under sections 451 and 302 of the Indian Penal Code, and in the alternative, for the offences under sections 451 and 302 read with section 34 of the Indian Penal Code on an allegation that, on 11th March 1990, which was `dhuleti' day, at about 2.30 p.m., over a quarrel between the children, and the accused Lilaben and her husband Mohanbhai had abused Babliben, but she kept quiet and therefore, it became calm. Thereafter, at 5.30 p.m., the accused Lilaben and the other accused who is her mother Narmadaben came to the house of Babliben and picked up a quarrel with her stating that she was trying to take out a stick to beat them, while Babliben was in fact trying to take out firewood from the loft. When Babliben told that she was only trying to take out firewood, both the accused persons dragged her out of her house. The accused Narmadaben caught hold of Babliben and Lilaben brought a can of kerosene from the house of Babliben and poured it over her. The accused Narmadaben at that time lighted a match and threw the burning match-stick on Babliben setting her ablaze. At that time, Babliben was wearing a polyester saree. She raised cries and her husband Ramsing who was sleeping in the house, woke up and saw Babliben burning in front of his house. Ramsing threw a quilt around her, extinguishing the flames. Thereafter, she was taken to the hospital in a rickshaw. Dr. P.M. Atodaria, who was in charge of the Burns Ward, examined her at 7.00 p.m. He was given the history of homicidal burns. From the hospital, Naroda police station was informed that Babliben was admitted in the hospital for treatment of burns. The P.S.I. Ninama, on receiving the message from the P.S.O., rushed to the Shardaben Hospital. He obtained opinion of the doctor about the condition of Babliben and then sent a requisition to the executive magistrate for recording her dying declaration. The police inspector - Chavda had also rushed to the hospital after receiving the message and he recorded the FIR of Babliben after obtaining the medical opinion that she was in a fit condition to make the statement. The requisition was sent for calling the

executive magistrate, who came and recorded the dying declaration of Babliben after ascertaining that she was in a fit state to make the dying declaration. The dying declaration was completed by him at 3.15 a.m. on 12-3-1990. In the F.I.R. as well as in the dying declaration recorded by the executive magistrate, Babliben had disclosed that the accused persons had, by pouring kerosene on her, set her ablaze. Babliben died on 13th March 1990 at 8.15 O'clock in the burns ward of the hospital. The post-mortem on her dead body was done by Dr. K.A.Shah and Dr. V.K.Rao under the supervision of Dr. R. Deshmukh in the Civil Hospital, Ahmedabad on 14th March 1990 between 9.10 a.m. and 10.45 a.m. As per the medical opinion, Babliben died due to shock as a result of burns and its complications. The articles which were seized from the scene of offence were sent for analysis to the Forensic Science Laboratory and except the two articles which were controlled earth, all other articles were found to be having particles of kerosene.

3. The defence was of total denial. According to the defence witnesses who were examined, Babliben had poured kerosene on herself and set herself ablaze. The two defence witnesses who were young boys of 18 and 14 years of age, were the sons of the sister of Ramsing, husband of the deceased. It appears that the accused persons were residing in the same `chawl'in the adjoining rooms and the parties were related, as reflected from the first paragraph of the F.I.R.

4. The trial Court held that the death of Babliben was homicidal. It was held that the prosecution had established beyond any reasonable doubt that the accused persons had committed the offence under section 302 of the IPC, by pouring kerosene over Babliben and setting her ablaze, which caused burn injuries and resulted in her death.

5. It has been argued by the learned counsel appearing for the appellants that the prosecution version was improbable, because, witness Ramsing who was already in the house could not have remained sleeping when his wife was dragged out of the house and set ablaze after pouring kerosene over her. It was also argued that the dying declaration could not have been relied upon by the trial Court in absence of any other evidence corroborating it. It was argued that there was no endorsement in the dying declaration made by the medical expert about the mental fitness of Babliben and therefore, the dying declaration cannot be made the basis of conviction. It was also argued that the motive of

quarrel between children was not strong enough to infer the involvement of the accused persons. It was further contended that, from the deposition of the defence witness Ramesh, it appeared that Babliben had poured kerosene over herself and committed suicide. It was, therefore, contended that the conviction of the accused persons cannot be sustained.

6. The learned Additional Public Prosecutor supported the reasoning and the findings of the trial Court, and submitted that there was sufficient and reliable evidence in form of dying declaration to convict the accused persons. He argued that there was no valid reason for Babliben to falsely implicate the accused persons. He also argued that the medical evidence corroborated the prosecution story emanating from the dying declaration. It was contended that the defence witnesses, who were sons of Ramsing's sister, were examined only with a view to save the accused persons, and that there was no reason to doubt the version of the deceased herself in her dying declarations and prefer the inherently improbable version of the defence witnesses, particularly Ramesh.

7. We have been taken through the entire evidence on record and the reasoning of the trial Court for coming to the finding on guilt of the accused persons. From the medical evidence, it clearly transpires that the death of Babliben was caused due to burns and all the burns were antemortem. Dr. Kalpesh Shah, in his deposition exh.28, has narrated the burn injuries which were found on the dead body of Babliben and which are also noted in the post-mortem notes exh.29. He has stated that these burns were possible if kerosene is poured over a person and a person is set ablaze. He has also stated that the burn injuries which were found on the body of Babliben were sufficient in the ordinary course of nature to cause death.

7.1 Dr.Pradip Atodaria at exh.30 has stated that he had examined Babliben on 11-3-1990 in the evening at 7 O'clock and at that time, she had given the history that some other persons had set her ablaze. This clearly rules out any possibility of an attempted suicide by Babliben. Dr. Atodaria had issued the certificate of injury at exh.32. He has stated that the injuries which he noticed on Babliben were sufficient in the ordinary course of nature to cause death, and that they were possible by pouring kerosene and setting her ablaze.

8. On the basis of the `vardhi' received from the

hospital, which is recorded at exh.37 and which also shows that the names of both the accused persons were disclosed at the earliest point of time, the Police Inspector of Naroda police station had proceeded to the hospital and recorded the FIR exh.48 which ultimately became a dying declaration. In that statement, it was stated by Babliben that Mohanbhai and his wife Lilaben were residing adjoining their house and Narmadaben, mother in-law of her `Bhanji' was also residing adjoining her house. On 11th March 1990, at about 2.30 p.m., while her husband who was at home due to the festival day being `dhuleti' and resting, Lilaben and her husband Mohanbhai had started abusing her in connection with the behaviour of Ramesh and Ranjit who had gone out, but she did not respond and therefore, things calmed down. In the evening, at 5.30 p.m., the accused Lilaben and Narmadaben came to her house. At that time, she was taking down firewood from the loft. On this, Narmadaben told her that she was taking out stick for beating them. She had why should she beat. At that time, Narmadaben and her daughter Lilaben caught hold of her hands and dragged her out of the house. Narmadaben kept on holding her while Lilaben went inside her house and brought a can of kerosene and poured kerosene over her. Narmadaben then lighted a match and threw it over her. She had worn polyester saree and she caught fire. She raised shouts and people gathered. A quilt was put around her and she lost her senses. When she ragained consciousness, she saw that her husband and Shardaben had brought her to the hospital. She stated at the end that she was in her full senses at the time when she was giving this statement.

8.1 The P.S.I. in his deposition exh.47 has stated that he had rushed to the Shardaben Hospital after receiving the `vardhi' and obtained the medical opinion about the mental fitness of Babliben. He was told by the doctor that she was conscious. He, therefore, recorded her statement exh.48. He has further stated that he had sent a `yadi' for calling the executive magistrate and in that `yadi', he had obtained the opinion of the doctor that Babliben was conscious, and that she can give the dying declaration. That `yadi' is at exh.22. It was sent to the executive magistrate by this P.I. on 11-3-1990. It was received by the executive magistrate at 2.00 a.m. on 12-3-1993.

8.2 The Executive Magistrate Shri Bhailalbhai Mansukhbhai in his deposition at exh.19 has stated that, after receiving this `vardhi', he had reached the hospital. He had noted that there was an endorsement in the `vardhi' that the patient was conscious and was in a

position to give a dying declaration. He went to Babliben who was shown to him by a nurse. He asked her name. Babliben gave her name and he found that she was conscious and was in a position to answer the questions. He started recording her dying declaration at 2.45 a.m. He was asking the questions and noting down the answers which were given by Babliben. He has stated that he had recorded the dying declaration as stated by her and taken her right thumb impression thereon. The dying declaration is proved at exh.20. He has categorically stated that there was no one else present when he recorded her dying declaration.

8.3 In the dying declaration exh.20, Babliben had stated that the incident had occurred at 5.30 p.m. in the evening near her house on 11-3-1990. It was stated that Lilaben and Narmadaben were her relatives. Lilaben's husband's name was Mohan. Lilaben was daughter of Narmadaben. They had poured kerosene on her and set her ablaze. She was wearing a polyester saree and blouse at that time. The incident had taken place after a quarrel over the children. After the incident occurred, her husband had put a quilt around her and brought her to the hospital and she had regained consciousness. She also stated that she had not set herself ablaze and repeated that Lilaben and Narmadaben had set her ablaze. She stated she was illiterate. She described her burns and stated that she was in a position to put her right thumb impression. She stated that the statement given by her was correctly recorded and that she had consciously and with understanding given her statement. The executive magistrate has put his signature after obtaining her thumb impression and below that writing, it is noted that during the recording of the dying declaration, he had made sure that the patient was in full senses during the recording of the dying declaration, and that no one else was present.

8.4 There is absolutely no reason to doubt the genuineness of the dying declaration exh.20. The executive magistrate had no personal interest and as an independent witness, he has duly proved the dying declaration. He has stated that he had read the endorsement at exh.22 which was a `vardhi' requiring him to go and record the dying declaration at the hospital. It showed that the patient was conscious and was in a position to make the dying declaration. That endorsement appears to have been made by Dr. Atodaria, as can be seen from the original document exh.22.

9. From the evidence on record, we are fully

satisfied that the dying declaration has been correctly recorded and that Babliben was in her full senses and in a fit mental state to give such dying declaration. As held by the Supreme Court in Bolem Bhaskara Rao v. State of A.P., reported in 1995 Supp (4) SCC 211, the Court has to look to the entire statement and the answers duly recorded by the Magistrate alongwith the doctor's evidence. On examination of the questions and answers, it was clearly held that the deceased must have been in a fit condition to make the statement.

9.1 In Ram Bihari Yadav v. State of Bihar, reported in (1998) 4 SCC 517, it was held by the Supreme Court that the mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters which can be observed by any person. But to lend assurance to those factors having regard to the importance of the dying declaration, the certificate of a medically trained person is insisted upon. In the absence of availability of a doctor to certify the above-mentioned factors, if there is other evidence to show that the recorder of the statement has satisfied himself about those requirements before recording the dying declaration, there is no reason as to why the dying declaration should not be accepted.

10. The version put up through the defence witness No.1 Ramesh that, in the noon at 12.30 hrs., Babliben had gone inside the house and poured kerosene over herself and brought a match-box and that the said witness had taken the matchbox from her and gone away, is obviously false, because, even as per the deposition of Ramsing, the incident took place in the evening at about 5.30 p.m. If Babliben had poured kerosene on herself at 12.30 noon, she would not have remained in that condition without attracting the attention of others till the evening at 5.30 p.m. when she was found by Ramsing burning outside the house. The version of the defence witness does not in any manner cast any doubt on the truthfulness of the dying declaration of Babliben.

11. We are fully satisfied from the evidence on record that the accused persons had set Babliben ablaze after pouring kerosene on her, as stated by her in her dying declarations and both of them are guilty of the offence of murder, as held by the trial Court. We find ourselves in full agreement with the reasoning and findings of the trial court in convicting the accused for the offence under section 302 of the Indian Penal Code. In the Charge, both the accused were separately charged for the offence under section 302 of the Indian Penal

Code, and in the alternative, for the offences under section 302 read with section 34 of the Indian Penal Code. The manner in which the offence was committed jointly by both the accused persons makes it clear that they shared the intention of causing death of Babliben and that they acted in a concerted manner, one of them holding her, the other one pouring kerosene on her and then her being set ablaze by lighting a match. The two persons have been convicted for the offence under section 302 of the IPC since the record clearly establishes that both of them have acted jointly in furtherance of their common intention of causing death of the accused persons. We therefore confirm the impugned decision with a slight alteration by convicting them for the offence under section 302 read with section 34 of the Indian Penal Code instead of separately under section 302 of the Indian Penal Code, as done by the trial Court.

12. The appeal is therefore dismissed, subject to the modification that the conviction of the accused persons shall be read as conviction under section 302 read with section 34 of the Indian Penal Code instead of section 302 of the Indian Penal Code. We are told that the accused - Narmadaben is on bail. The bail will obviously stand cancelled.

SEPTEMBER 20, 2001 [R.K.ABICHANDANI, J.]

[D.K.TRIVEDI, J.]

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